

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MITCHELL L. CLEM
Claimant

VS.

ROADWAY EXPRESS
Respondent
Self-Insured

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Docket No. 183,119

ORDER

Claimant requests review by the Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on November 20, 1995. The Appeals Board heard oral argument by telephone conference on March 7, 1996.

APPEARANCES

Claimant appeared by his attorneys, Jason M. Pottenger and Bruce Jackson of Kansas City, Missouri. Respondent, a qualified self-insured, appeared by its attorney, Wade Dorothy of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the November 20, 1995 Award.

ISSUES

Claimant lists the following issues for review by the Appeals Board:

- (1) Whether the Administrative Law Judge erred in failing to consider and make part of the evidentiary record a court-ordered independent medical examination report;
- (2) Nature and extent of claimant's disability;
- (3) Whether claimant was temporarily and totally disabled from July 6, 1993 to September 2, 1994; and

- (4) Whether claimant is entitled to future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and hearing the argument of the parties, the Appeals Board finds as follows:

- (1) The parties were unable to agree on claimant's functional impairment and pursuant to K.S.A. 44-510e(a) the Administrative Law Judge ordered an independent medical examination of the claimant by C. Erik Nye, M.D., on April 19, 1995. K.S.A. 44-510e(a) provides in part:

"If the employer and the employee are unable to agree upon the employee's functional impairment, such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge"

Pursuant to the Administrative Law Judge's Order, Dr. Nye examined the claimant on June 12, 1995. Dr. Nye forwarded a report dated June 12, 1995 that contained his findings to the Administrative Law Judge. The Administrative Law Judge had specifically requested Dr. Nye issue an opinion regarding claimant's functional impairment. However, Dr. Nye's report does not contain an opinion in reference to functional impairment. At the time of the examination, Dr. Nye found that the claimant had not met maximum medical improvement. Therefore, Dr. Nye made further diagnostic and treatment recommendations. The Appeals Board assumes that before Dr. Nye was able to express an opinion on permanent impairment, the claimant, in his opinion, would have had to have met maximum medical improvement.

Neither the claimant nor the respondent presented Dr. Nye's testimony by deposition concerning his examination of the claimant as required by K.S.A. 44-519. Respondent, in its submission letter dated October 17, 1995, objected to Dr. Nye's report being considered by the Administrative Law Judge as part of the evidentiary hearing in this case. Respondent argued that the Administrative Law Judge cannot consider the report because K.S.A. 44-519 requires deposition testimony of a health care provider before the health care provider's opinions and findings are admissible. Further, respondent contends that Dr. Nye's report is not relevant in this case and cannot be considered as evidence since Dr. Nye did not present an opinion on claimant's functional impairment.

The Administrative Law Judge's Award does not specifically list Dr. Nye's report as part of the evidentiary record. However, the Administrative Law Judge does make a general statement that the pleadings and correspondence contained in the administrative file are part of the record. The Administrative Law Judge did not mention in his findings whether he did or did not consider Dr. Nye's report in his decision. The claimant argues that the Administrative Law Judge erred in not considering Dr. Nye's report in deciding the award. Claimant asserts that since the Appeals Board's standard of review is de novo, the Appeals Board should review Dr. Nye's report and consider it as part of the evidentiary record for purposes of this review.

The Appeals Board finds that a health care provider's report that is requested by the Administrative Law Judge pursuant to K.S.A. 44-510e(a) is admissible as evidence in a workers compensation case without the deposition testimony of the health care provider

for the limited purpose of expressing the health care provider's opinion on the employee's functional impairment. The Appeals Board recognizes that in this case Dr. Nye did not issue an opinion on claimant's functional impairment. However, the Appeals Board finds that Dr. Nye's report in this instance should be considered as his examination and findings relate to the issue of functional impairment.

Accordingly, after a review of the whole evidentiary record, the Appeals Board finds it is not clear whether or not the Administrative Law Judge considered Dr. Nye's report in reaching his decision. However, the Appeals Board has reviewed and considered Dr. Nye's report. We find that his opinion, as contained in the report to the effect that claimant has not reached maximum medical improvement, is not persuasive when weighed against the other medical evidence presented, specifically the deposition testimony of treating physicians Edward A. Prostic, M.D. and James H. Whitaker, M.D.

(2,3) The Administrative Law Judge found that the claimant had failed to prove that as a result of his work-related injury that he had sustained a whole body impairment. The Administrative Law Judge limited claimant's award to permanent partial general disability benefits based upon a 42.5 percent permanent functional impairment to his lower right leg, a scheduled injury, set forth in K.S.A. 1991 Supp. 44-510d(a)(15).

The Administrative Law Judge also denied the additional weeks of temporary total disability benefits requested by the claimant, finding that the claimant had not proven that he was medically unable to perform substantial and gainful employment from July 6, 1993 to September 2, 1994.

The Appeals Board finds that the Administrative Law Judge's Award should be affirmed in reference to these two issues. The Administrative Law Judge sets out his findings of fact and conclusions of law in some detail concerning these two issues. The Appeals Board finds it is not necessary to repeat those findings and conclusions in this Order. Because the findings and conclusions of the Administrative Law Judge are found to be accurate and appropriate, the Appeals Board adopts these findings and conclusions as its own as if specifically set forth in this Order.

(4) The Appeals Board finds, based on the medical evidence presented, that an award of future medical treatment upon proper application and approval by the Director is appropriate.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 20, 1995 should be, and hereby, is affirmed as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Mitchell L. Clem, and against the respondent, Roadway Express, Inc., a qualified self-insured, for an accidental injury which occurred on June 16, 1992 and based upon an average weekly wage of \$717.41.

Claimant is entitled to 68 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$19,652.00, followed by 51.85 weeks of permanent partial general disability at the rate of \$289.00 per week or \$14,984.65 for a 42.5% permanent

loss of use of the lower right leg, making a total award of \$34,636.65 which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

Future medical treatment will be considered upon proper application and approval by the Director.

The unpaid medical expenses of \$40.00 to Dr. Whitaker and \$259.00 to Research Medical Center are also ordered paid by the respondent as authorized medical.

Costs of transcripts in the record are taxed against respondent and carrier as follows:

Hostetler & Associates	\$227.65
Metropolitan Court Reporters, Inc.	\$272.80
Patricia A. McGhee, C.S.R.	\$283.10

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jason M. Pottenger, Kansas City, MO
Bruce Jackson, Kansas City, MO
Wade Dorothy, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director